

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:25-cv-10685-WGY

4
5 AMERICAN ASSOCIATION of UNIVERSITY PROFESSORS, et al,
6 Plaintiffs

7 vs.

8
9 MARCO RUBIO, in his official capacity as
10 Secretary of State, et al,
11 Defendants

12 *****

13
14 For Bench Trial Before:
15 Judge William G. Young

16 ***EXCERPT***

17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Monday, July 14, 2025

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
rhr3tubas@aol.com

A P P E A R A N C E S

RAMYA KRISHNAN, ESQ.
CAROLINE DeCELL, ESQ.
ALEXANDER ABDO, ESQ.
SCOTT B. WILKENS, ESQ.
ALEXANDRA CONLON, ESQ.
Knight First Amendment Institute at Columbia
University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
E-mail: Ramya.krishnan@knightcolumbia.org

and

COURTNEY GANS, ESQ.
NOAM BIALE, ESQ.
Sher Tremonte LLP
90 Broad Street, 23rd Floor
New York, NY 10004
(212) 540-0675
Email: Cgans@shertremonte.com
For Plaintiffs

ETHAN B. KANTER, ESQ.
WILLIAM KANELIS, ESQ.
VICTORIA M. SANTORA, ESQ.
JESSICA STROKUS, ESQ.
DOJ-Civ
P.O. 878
Ben Franklin Station
Washington, DC 20044
(202) 616-9123
Email: Ethan.kanter@usdoj.gov

and

SHAWNA YEN, ESQ.
United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
Email: Shawna.yen@usdoj.gov
For Defendants

P R O C E E D I N G S

EXCERPT BEGINS

(Resumed, 10:55 a.m.)

THE COURT: The Court takes this opportunity, on the record, in the presence -- in open court, in the presence of counsel, to accept gratefully the invitation of the Court of Appeals to address the, um, mandamus petition both generally and expressly to address the issue of waiver with respect to that petition.

I'm going to start by, um, making a request to the Court of Appeals. I'm not going to argue in any way the substance of the petition. That's for the parties. The Court's conduct is all a matter of record. And the transcript governs and is more, um, important than anything I say now. But I'm going to start with the request, simply as a matter of case management, that I would make of the Court of Appeals. And it is this.

I request the Court of Appeals to lift the stay, though I express no opinion on the disposition of the petition for mandamus, and it might well, um -- it's entirely up to the Court of Appeals, it might well make sense to let the petition survive so that it may have the benefit of further proceedings in this court.

But I would ask the Court of Appeals to lift the stay so that the evidentiary portion of this first phase

1 of this jury-waived trial might complete.

2 We are in the, um, second week of a two-week --
3 9-day trial, and once that trial is over, or the
4 evidentiary portion is over, it's appropriate for this
5 Court to sketch what I anticipate will be the necessary
6 further proceedings.

7 This is a case -- and I know the Court of Appeals
8 appreciates this, but this is a case where intent and
9 motive play a significant role, and once the evidence is
10 fully before the Court, it's the Court's intention to
11 take the matter under advisement. This is not a case
12 where even as to a portion of the case the Court expects
13 that, because of the evidence, to be in a position to
14 make any ruling from the bench, rather the Court expects
15 to take the case under advisement, seek, um, requested
16 findings and rulings from all parties, carefully review
17 the record, and then issue a full written opinion.

18 The actual likelihood of that opinion emerging
19 before September is unlikely. So the urgency to fully
20 decide the, um, petition is, um, not grave. Given the
21 fact that what's done is done, the plaintiffs have
22 access to the material which the Court deemed
23 appropriate to subject to cross-examination during the
24 trial, and I adhere to that decision and expect to
25 adhere to it, subject to a proper, um, a claim of

1 privilege during the course of the remaining
2 proceedings. And I'll speak to that in a moment.

3 And one can anticipate, of course, that as this is
4 only the first phase of this case, if the case were to
5 resolve in favor of the defendant public officials, then
6 of course the plaintiffs would have the right to a
7 plenary appeal. Contrary-wise, if the case were, at
8 least on what I'll call the "liability phase," resolved
9 against one or more, and I treat them separately, of the
10 defendant public officials, um, that would afford an
11 opinion -- that would afford a place for an
12 interlocutory appeal, should the Court of Appeals wish
13 to evaluate the propriety of that decision while this
14 Court wrestled with the very real problem, even if
15 that's how it were to play out, of redressability,
16 something this Court has not addressed in the -- its
17 hearings thus far. So that's the Court's approach to
18 the management of this case.

19 Let me then, without arguing the point, um,
20 explain the Court's position with respect to matters to
21 be considered on the petition for mandamus. And I think
22 it's important to understand that the Court, and I
23 believe the parties, place the documents in question,
24 because at bottom, this is an issue over evidentiary
25 rulings mid trial as to certain documents produced.

1 I separate the documents into three buckets. What
2 I've called the "core documents," these documents are
3 documents that evidence the transmission of materials
4 about certain target subjects, which I've required the
5 plaintiffs to designate, which they are arguing are
6 exemplars of their so-called "ideological deportation
7 policy." The Court of Appeals will understand that the
8 defense asserts there is no such policy and that the
9 proceedings of the government agencies were lawful in
10 every relevant part.

11 So the core documents are the "ROAs," so-called,
12 and transmittal letters, um, e-mails commenting thereon,
13 that were transmitted from the Department of Homeland
14 Security to the Department of State, specifically to the
15 Bureau of Consular Affairs, and certain of those, the
16 transmittal letters that so transmitted them, and, um,
17 thereafter the "decision memos," so-called by this
18 Court, that the Director of the Bureau of Consular
19 Affairs transmitted most, but not all, of the packet to
20 the Secretary of State for decision, as required under
21 the law.

22 The actual interplay is -- and the standard
23 procedure is best illustrated in a chalk that the Court
24 has marked HN, and will attach to the cover letter sent
25 to the Court of Appeals, which, um, so far as this Court

1 can see, accurately describes the standing procedure of
2 both executive departments in handling matters. It of
3 course does not answer the key question which concerns
4 the content of the materials so transmitted. So those
5 core materials are the materials that I understand the
6 petition to center upon, and I'll come back to them.

7 There are two other packets of materials that I
8 transmitted in bulk to the Court all together, but I've
9 broken them out for this discussion. As to one
10 document, which I'll call Exhibit A, the government has
11 properly, and the Court recognizes the proper --
12 "proper" in the sense that I recognize that it's been
13 properly asserted and not waived, the government has
14 asserted an Executive Privilege. That's a, in this
15 Court's eyes, a difficult issue and one the Court has
16 not resolved and which the Court understands it is free
17 to resolve as the case goes on. So it's appropriate to
18 indicate to the Court of Appeals what I've told the
19 parties about how it will be resolved.

20 It seems to this Court that there are three
21 possible resolutions. First, that the Court resolves
22 that the specific document in question is subject to an
23 Executive Privilege. If it is, whenever the Court makes
24 that determination, it physically forthwith will return
25 the document to defense counsel and make a notation on

1 the record.

2 The second possibility is that, without deciding
3 whether the document is, um, subject to an Executive
4 Privilege, the Court, as it comes to analyze the case --
5 I've read the document and I largely understand it, um,
6 it makes no difference to the decision and the Court
7 needs not cite it. If that is, um, decided, the Court
8 will immediately return it to the defense counsel and
9 again make a notation on the record.

10 The third possibility is that the Court, um,
11 rejects, overrules the assertion of an Executive
12 Privilege and also decides that the document, which the
13 Court has thus far characterized as "peripherally
14 relevant," is in fact relevant to some conclusion the
15 Court determines to make. In that case, if the -- if
16 this present petition were, um, still pending, a dispute
17 over this document might be beholden to that petition.
18 And I've told counsel, if I make that decision, I will
19 stay it for 7 days so that they may take action with
20 respect to that document.

21 The third packet of documents are documents as to
22 which I have now allowed privileges to be asserted, and
23 they have been, but which will not figure in the, um,
24 oral testimony as no further documents are going to be
25 produced to the plaintiff -- the plaintiffs by the

1 Court, but which all parties agree the Court may look
2 at, determine privileges, as it goes forward, and I
3 shall do so.

4 Again, if I decide to rely upon and cite a
5 document, implicitly or explicitly, it will be clear
6 that I have overruled the privilege. If I don't cite
7 the document, it, um -- no ruling is necessary and those
8 documents no longer figure in the case.

9 The written -- were a decision on the petition of
10 mandamus -- for mandamus to await either appeal or allow
11 an interlocutory appeal, again that could all be
12 reviewed in the ordinary course, and evidentiary error
13 will be reviewed, and of course it is, as to whether it
14 makes a substantial difference in the outcome. And I
15 would have the liberty of, on a full record, to make the
16 findings and rulings that, um, I believe either have or
17 have not been proved by a fair preponderance of the
18 evidence.

19 So let me conclude simply by focusing on the core
20 documents and reiterate -- which do seem central to the
21 issues raised by the petition for mandamus, and, um,
22 respond directly to the Court's use of the word
23 "waiver," which the invitation expressly sought the
24 Court's further explanation.

25 The use of the word "waiver," upon reflection, was

1 infelicitous, so, um, it caused no prejudice to anyone,
2 because the Court followed it up with an explanation.
3 Here is the Court's view of what has happened.

4 The -- during a discussion on the plaintiffs'
5 motion to compel certain documents for, um, which the
6 plaintiffs claim were part of the record of decision of
7 its so-called "ideological deportation policy," the
8 Court declined to, um -- the Court denied the
9 plaintiffs' motion. But did say -- and again the
10 transcript of what I actually said at the time governs,
11 but I'll characterize it, said, "But I would receive
12 documents as to which the law-enforcement privilege was
13 asserted and I would honor it."

14 Now again the transcript governs. What happened
15 happened, was that ultimately over 300 documents were
16 submitted to the Court where the defense asserted not
17 only the law-enforcement privilege, but various
18 privileges, and, um, took, with respect to -- when you
19 look at these documents, a very aggressive, um,
20 position. The Court's -- the Court's review of the
21 documents became more, um, thorough as trial approached
22 and as the acting trial became to the front burner and
23 trial commenced, and the Court, as to these core
24 documents, um, came to the conclusion that the
25 law-enforcement privilege was inapplicable and was

1 asserted extraordinarily overbroadly. The Court
2 therefore was in a quandary.

3 Should, having overruled the -- that privilege,
4 should the documents be disclosed to the defense? And
5 the Court determined, to have the fairest possible
6 trial, that such disclosure was in the interests of
7 justice, and I did disclose it. Disclose them.

8 Various minor issues with respect to the -- I
9 shouldn't call them "minor," but with respect to
10 those -- to that disclosure have been worked out, I
11 believe, to the satisfaction of the parties. The
12 documents in their raw form I anticipated and expected
13 redaction of e-mails and telephone numbers. The defense
14 wants more. The, um -- there was indeed one reference
15 to something that, in all fairness, in fact bore on the
16 law-enforcement privilege, despite the Court's ruling.
17 That was corrected by full cooperation between all
18 parties, and the proper redaction made.

19 I say the use of the word "waiver" was
20 infelicitous because the Court did ask the defense to
21 submit the documents with respect to which it claimed a
22 law-enforcement privilege. The government now says that
23 they were -- they don't say this expressly, but their
24 position is they were snookered, and I got the documents
25 just to disclose them. Well that's not so. I certainly

1 never conceived that anything I said could be thought to
2 estop the Court from making proper rulings with respect
3 to the documents. And again, the transcript will
4 govern. But it's the Court's position that proper
5 rulings have been made.

6 One last point which, um, I state again simply to
7 be of assistance to the Court of Appeals. Today the
8 parties and the Court have had a very productive
9 discussion, the full transcript is of course available
10 to the Court of Appeals, and I recite only
11 determinations that I believe I am still authorized to
12 make with respect to these core documents. And I have
13 made the following.

14 Actually I've made the following with respect to
15 the assertion of the attorney-client privilege. Having
16 reviewed the documents and the arguments, I do rule that
17 the attorney-client privilege has been waived. It
18 simply is inapplicable in a situation where counsel has
19 provided documents to the factfinder, um, on the theory
20 that these documents are relative -- are relevant to the
21 decision, as certainly the core documents are. That
22 constitutes a waiver of the attorney-client privilege,
23 and the Court, less there be any doubt about it, so
24 rules.

25 In one respect the Court sustains the, um, claim

1 of deliberative process privilege and I have sustained
2 it as to, um, certain provision of legal advice by
3 attorneys in certain e-mails that form a portion of the
4 core documents. Beyond that sustaining, after
5 discussion with counsel, I make no further rulings as to
6 the deliberative process privilege, or any other
7 privilege, as to the core documents. And, um, I won't
8 say it's by agreement, but we've worked out that if
9 permitted to continue the trial, I will make what the
10 Court considers appropriate rulings on a
11 question-by-question basis.

12 Essentially the issues relate to the Director of
13 the Bureau of Consular Affairs, Mr. Armstrong, whose
14 testimony had just commenced cross-examination when the
15 stay, um, was transmitted, and a Mr. Watson, who wrote,
16 um, the transmittal letters from the Department of
17 Homeland Security to the State Department.

18 One other thing is significant and I will state
19 it. I understand that whatever ruling the Court makes
20 as to cross-examination in the course of the trial, the
21 Court is empowered, without objection by the government,
22 to review all the records in its possession, make proper
23 privilege rulings, and rely upon those which it rules
24 the privilege or qualified privilege does not apply.

25 With those explanations, which I truly hope are

1 helpful, the Court will respectfully submit this
2 transcript, just as soon as I get my hands on it, to the
3 Court of Appeals, respectfully and with appreciation for
4 being given the opportunity to comment on these
5 proceedings.

6 ***EXCERPT ENDS***
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Monday, July 14, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 07-14-25

RICHARD H. ROMANOW Date